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In The

Supreme Court of the United States

October Term, 1977

No. 77-302

FRANK L. RIZZO, *et. al.*,

Petitioners,

vs.

HAROLD ROSENTHAL,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

Respondent, Harold Rosenthal, in his district court complaint, alleged that he had been fired from his position as an Administrative Assistant II in the Commercial and Industrial Relocation Department of the Redevelopment Authority of Philadelphia (hereinafter "RDA") in violation of his First

Amendment right to free political association and belief. Further, he alleged that he occupied a "non-policymaking" position with the RDA.

The city petitioners, Frank L. Rizzo and Philip Carroll, Mayor and Deputy Mayor of the City of Philadelphia, respectively, defended the complaint on the basis that respondent occupied a "policymaking" position, as that term is used in *Elrod v. Burns,* 427 U.S. 347 (1976); while the RDA and Augustine Salvitti, the Executive Director of the RDA who was responsible for the firing of the respondent, admitted, in his answer to the complaint, that respondent was in a "non-policymaking" position.

The depositions of respondent, Augustine Salvitti, Lynn Abraham, the Executive Director of the RDA during most of respondent's 15 month tenure, were taken, among others. On defendants' motion for summary judgment, the district court entered judgment for all defendants on the First Amendment issue, holding that "based on our review of the affidavits and deposition transcripts, we find that plaintiff was employed in a policymaking position with the RDA" (Petition at A18), and that therefore respondent could not challenge the termination of his employment on the basis of an infringement of his First Amendment rights.

The Court of Appeals for the Third Circuit reversed the district court, holding that ". . . the district court took it upon itself to weigh the conflicting evidence and resolve the issue against Rosenthal on a motion for summary judgment. This was error" (Petition at A4). The court held that respondent was

". . . improperly deprived of a full trial on the issue of his status as a policymaker" (Petition at A7).

Respondent, from the outset, has maintained that whether or not he was a policymaker is an issue which requires a trial on the merits, and not one which is susceptible to decision on summary judgment. An examination of the "factual" statements contained in petitioners' brief, particularly in its "Statement of the Case", and indeed, even in its "Questions Presented", shows that there remains a genuine issue of material fact when compared to evidence supportive of respondent's position.

Petitioners state, in their "Questions Presented", that respondent was "an indisputably confidential employee", and an "intradepartmental spy". These conclusions of law or conclusions of ultimate fact (which, *ipso facto,* decide the constitutional question) are hotly disputed, as are the evidentiary facts underlying them. See, *e.g.,* Harold Rosenthal Affidavit, Plaintiff's Response to Defendants' Motion for Summary Judgment, wherein Rosenthal states:

> "throughout the course of my employment with the Authority, and during the tenure of Lynn Abraham, I performed neither a 'spying' nor an investigative function for Lynn Abraham, formally or informally, officially or unofficially, overtly and covertly. I never reported to Lynn Abraham directly by myself in any capacity. . .in all respects I was treated like any other employee at the Authority."

Petitioners assert that respondent was hired as a "confidential" employee and that he was the Executive Director's "personal investigator", and further that respondent's "primary purpose was to investigate and report directly to her [Executive Director]" (Petition at 3). Contrariwise, respondent's position is that his job was to perform the functions of the position for which he was hired, *viz.*, an Administrative Assistant II (Deposition of Lynn Abraham at 9-10). Furthermore, he performed his job very well, having received three (3) "superior" job performance evaluations during his 15 month tenure. Significantly, these evaluations were given by persons other than Lynn Abraham, the individual with whom respondent allegedly had a "confidential" relationship.

Petitioners state that the majority opinion in *Rosenthal* agreed that respondent was a "confidential" employee and an "intradepartmental spy" (Petition at 5-6). However, nowhere in the majority's opinion is it stated that respondent was in fact a "confidential" employee or an "intradepartmental spy", although they intimate that he *may* have been. Again, petitioners leaped to unwarranted conclusions of law.

The majority opinion in *Rosenthal* viewed the case as one of whether or not respondent was a policymaker in the same way the *Elrod* plurality had intended the question to be viewed. It recognized the difficult factual problems inherent in such a determination and thus decided that summary judgment was highly improper. This is the correct result. The dissent, on the other hand, like the district court, would have used summary judgment to decide the issue.

Petitioners would have this court believe that all of the underlying facts are not in dispute, but that only an ultimate conclusion of fact or law need be drawn. The dissent states that "All parties agree that Rosenthal was hired as Lynn Abraham's personal investigator" (Petition at A9). Respondent vouchsafely disputes this finding. Similarly, the dissent maintained that Rosenthal's ". . . mission was to investigate a certain department and report directly back to Abraham on its activities" (Petition at A14-15). Again, this is disputed and the record contains substantial evidence contrary to this finding. Furthermore, the dissent completely ignored the record evidence establishing that respondent was a highly competent employee. The dissent erroneously based its legal conclusions on facts which, at best, were incomplete, and, at worst, were non-existent or unsupportable by the record.

It is clear that there are many basic factual issues needing resolution before this Court can properly and judiciously make a determination of the parameters of the legal principles involved. The order of the court of appeals is correct in that, *inter alia,* it has brought this litigation that much closer to a full evidentiary hearing on the merits of whether or not respondent occupied a policymaking position.

REASONS FOR DENYING THE WRIT

I.

Petitioners failed to exhaust all available appellate rights.

Rule 40 of the Federal Rules of Appellate Procedure provides that any party aggrieved by a decision of the court of appeals may file a petition suggesting that the decision be reheard and reviewed by the court *en banc*. This was an appellate right which petitioners failed to exhaust without any apparent reason. Exhaustion of appellate rights is always significant; it is most significant in this case in that the legal question raised by petitioners is, at first blush, a novel one, and thus one which should first require the attention and adjudication of an *en banc* court. Petitioners' failure to request an *en banc* hearing should militate against this Court's exercise of its extraordinary and discretionary jurisdiction.

II.

The legal issue presented is not ripe for decision by this Court: the facts of the case are in sufficient dispute that the Court lacks a proper factual record; and that this Court should await more lower court decisions.

Were this Court to hear the legal question involved it would be doing so on the basis of a sparse factual record. It must be remembered that respondent's complaint was dismissed by way of summary judgment without the benefit of an evidentiary hearing. Petitioners' brief states that "respondent was, according

to the testimony of all witnesses, a 'confidential' employee" (Petition at 8). Harold Rosenthal, in his affidavit, disputes this; Lynn Abraham, in her deposition, states that in all respects Rosenthal was treated like any other employee of the RDA. Indeed, the deposition of Augustine Salvitti, the Executive Director who fired respondent, states that Salvitti thought Rosenthal was a "spy", but when asked for specific facts supporting this belief, he was unable to give any. Nor for that matter was he able to give any specific facts as to why he had the opinion that respondent was not qualified for the job he had been performing (Deposition of Augustine Salvitti at 5-6).

Petitioners, of course, places great weight in the *Rosenthal* dissent which, *inter alia,* states that ". . . Rosenthal was not an integral part of the Commercial Industrial Relocation Division (sic): rather he was a personal extension into that department of its administrator Lynn Abraham. . . his [Rosenthal's] original function now defunct, he could not implement the policies of the new administration. . ." (*Rosenthal* at A16). With all due deference to the opinion, these are characterizations and conclusions not supported by the factual record, incomplete as it is. The dissent ignores the fact that substantial record evidence exists which shows that Harold Rosenthal was a highly capable employee in his function as an Administrative Assistant II and that he had received three "Superior" job evaluations from his supervisors, which evaluations were rendered on a regular basis, as they were with any other employee of the RDA.

The Court should have the benefit of a full factual record on all of the issues involved which may bear on such terms as "policymaking" and "confidential" before delineating the legal

principles governing the extent to which a governmental employee is, or is not, protected by the First Amendment.

In this regard, the Court does not have the advantage and benefit of any opinion of either courts of appeals or district courts. By waiting for future cases, this Court would have a variety of views, rather than only a majority and dissenting opinion from one appellate court. As Mr. Justice Frankfurter said in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917 (1950), (opinion dissenting from denial of certiorari):

> "It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening."

The fact that this issue is not ripe for decision is further illustrated by the petitioners' appellate briefs which show, in the "Statement of Issues Presented", that whether or not Rosenthal was a "confidential" employee, as Mr. Justice Stewart used the term in *Elrod*, was not squarely addressed to either the court of appeals or the district court (Respondent's Brief at A1).

III.

The opinion below is fair, accurate, and consonant with existing authority.

The majority opinion in *Rosenthal*, joined in by Chief Judge Seitz, was based specifically on the plurality opinion in *Elrod*. The court of appeals applied the law of this Court as enunciated in *Elrod* as it existed, and as such, the decision is in

line with applicable authority. In addition, the opinion was fair in that Harold Rosenthal, having been deprived of his day in court, now has an opportunity to present to a jury all of the facts relevant to his case.

IV.

The basic underlying facts are so in dispute that it would be improvident for this Court to base an opinion on them.

Petitioners would lead this Court to believe that the undisputed evidence is that Rosenthal was a "spy," "personal investigator," a "confidential employee," and an "advisor," but, on the other hand, there is ample evidence in the record demonstrating that Harold Rosenthal was merely a "soldier" functioning as a "relocation technician," and, in the testimony of Lynn Abraham:

> "He was there to check and see that that was done and when somebody put in a voucher to see that X number of crates were moved, they checked it . . ." (Deposition at 12-13).

She further testified that:

> ". . . one does not have to be a college graduate to read a manual and add two and two and make sure it does not come out to seven." (Deposition at 13).

In terms of an alleged spying function performed by Rosenthal, Ms. Abraham said that Rosenthal did not have such a function and that he simply worked for her as Executive Director (Deposition at 10).

As the majority opinion in *Rosenthal* notes ". . . evidence as to the nature of Rosenthal's duties, in the form of depositions, is imprecise and cuts both ways" (Petition at A4), thus supporting its holding that the conflicting evidence should not have been decided on a motion for summary judgment, but rather required a trial on the merits. For this Court to hear the legal issue involved, at this juncture, would be an injudicious leap to constitutional adjudication.

CONCLUSION

For the foregoing reasons, respondent prays the Court to deny the requested writ.

Respectfully submitted,

s/ Michael Cox
Attorney for Respondent

APPENDIX

PETITIONERS' RIZZO AND CARROLL "COUNTER STATEMENT OF ISSUES PRESENTED" IN BRIEF TO COURT OF APPEALS

I. Did appellant Rosenthal have a property interest in his employment protected by the Due Process Clause of the Fourteenth Amendment?

II. Did not Salvitti have an unfettered right to discharge Rosenthal under the law?

PETITIONERS' SALVITTI AND RDA "STATEMENT OF ISSUES PRESENTED FOR REVIEW" IN BRIEF TO COURT OF APPEALS

I. Did the trial court err in finding that Pennsylvania law does not recognize a property interest in employment?

II. Did the trial court err in finding the plaintiff-appellant was a policymaking employee and therefore dischargeable at will?